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No. 04-10566

IN THE SUPREME COURT OF THE UNITED STATES

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

Petition for Writ of Certiorari to the
Oregon Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where petitioner has failed to make any showing that he was prejudiced as a result of the State's violation of the Vienna Convention, should this Court grant his petition for writ of certiorari to consider whether the Vienna Convention conveys individual rights of consular notification and access to a foreign detainee enforceable in the courts of the United States and whether suppression of petitioner's post-arrest statements to the police is an appropriate remedy for violation of those rights?

2. Petitioner contends that the police violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution when they obtained custodial statements from him following repeated Miranda warnings provided in both English and Spanish. This issue involves the routine application of settled law to the particular facts of this case and the Oregon Supreme Court declined to address it. Although petitioner attempts to incorporate the State's violation of the Vienna Convention into the mix of factors to be considered as relevant to the voluntariness question, petitioner's efforts are too late. Petitioner did not argue in the trial court or the Oregon Court of Appeals that the violation of the Vienna Convention played any role in petitioner's waiver of his Miranda rights and, although he made that argument in the Oregon Supreme Court, that court did not consider the unpreserved claim. Should this Court grant review to consider petitioner's claim?

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No. 04-10566

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MOISES SANCHEZ-LLAMAS,

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Petition for Writ of Certiorari to the
Oregon Supreme Court

OPINIONS BELOW

The Oregon Court of Appeals affirmed petitioner's conviction and sentence without issuing a written opinion. *State v. Sanchez-Llamas*, 191 Or. App. 399, 84 P.3d 1133 (2004), Pet. App. 12. The Oregon Supreme Court affirmed petitioner's conviction and sentence in a written opinion. *State v. Sanchez-Llamas*, 338 Or. 267, 108 P.3d 573 (2005), Pet. App. 14-23.

JURISDICTION

The Oregon Supreme Court issued its decision on March 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. Petitioner is a Mexican national, who was arrested in December 1999 after he shot at police, wounding one officer. *Sanchez-Llamas*, 338 Or. at 269, Pet.

App. 15. After his arrest, the police read petitioner *Miranda* warnings in both English and Spanish, but did not inform him that he could communicate with the Mexican consulate and did not inform the consulate of his arrest. *Id.* During interrogation, petitioner made a number of incriminating statements. *Id.*, 338 Or. at 270, Pet. App. 16. He moved pre-trial to suppress the post-arrest statements on the ground that the police failed to comply with the requirements of Article 36 of the Vienna Convention. *Id.* The trial court denied the motion and ruled that "any violation of the Vienna Convention that may have occurred * * * [did] not require suppression of [petitioner's] statements." *Id.* (quoting trial court ruling). After a jury trial, petitioner was convicted of 11 felony counts, including attempted murder and attempted aggravated murder, and sentenced to 246 months in prison. *Id.*

2. In his direct appeal to the Oregon Court of Appeals, petitioner raised the two issues he pursues here: (1) that his post-arrest statements should have been suppressed based on the State's violation of the Vienna Convention and (2) that his statements should have been suppressed because the circumstances surrounding his arrest and detention show that the statements and waiver of his *Miranda* rights were not voluntary. The Oregon Court of Appeals affirmed without issuing a written opinion. *State v. Sanchez-Llamas*, 191 Or. App. 399, 84 P.3d 1133 (2004).[1]

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[1] The Oregon Court of Appeals addressed the Vienna Convention issue in *State v. Chavez*, 172 Or. App. 326, 19 P.3d 923 (2001), and concluded that suppression of evidence is not the appropriate remedy for a violation of the Vienna Convention. The Oregon Supreme Court allowed review, but did not reach the merits because the court determined that Chavez had failed to preserve the argument that

Footnote continued

3. The Oregon Supreme Court granted review and affirmed. The court addressed only the first issue—whether the State's violation of the Vienna Convention required suppression of petitioner's post-arrest statements—and concluded that the Vienna Convention "does not create rights that individual foreign nationals may assert in a criminal proceeding." *Sanchez-Llamas*, 338 Or. at 269, Pet. App. 15. The court began by noting "the general rule, widely recognized in the federal courts, [] that rights created by international treaties belong to the signatory state and are *not* enforceable in American courts by private individuals." *Id.* at 272, Pet. App. 18 (emphasis in original). The court acknowledged that the presumption against the creation of individual, judicially enforceable rights may be overcome "by explicit wording and even by provisions that necessarily imply a private right of judicial enforcement." *Id.* at 274, Pet. App. 20. Nevertheless, the court found nothing in Article 36 of the Vienna Convention to suggest that the treaty refers to a detainee's "rights" as anything other than a convenient way of describing the obligation of the signatory state. *Id.* at 275, Pet. App. 21. Instead, the wording and purposes of the treaty "suggest that the treaty and Article 36 are concerned with relationships and obligations among *nations*, not with individual rights." *Id.* (emphasis in original; footnote omitted).

(...continued)
suppression is required for violations of the Convention. *State v. Chavez*, 335 Or. 44, 56 P.3d 923 (2002). In this case, petitioner acknowledged in the Court of Appeals that that court's prior holding in *Chavez* controlled.

Finally, the court considered the State Department's interpretation of the Vienna Convention as consistent with the court's reasoning, *Id.* at 276, Pet. App. 22, and noted the unequivocal agreement of the state and federal courts that have addressed the issue. *Id.* at 277 n. 10, Pet. App. 23. The court concluded "that Article 36 of the [Vienna Convention] does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding" and affirmed petitioner's conviction and sentence. *Id.* at 276-277, Pet. App. 22-23.

ARGUMENT

1. Petitioner asks this Court to consider whether he is entitled, in a state criminal proceeding, to suppression of otherwise-lawfully obtained statements because of the State's failure to comply with Article 36 of the Vienna Convention on Consular Relations. April 24, 1963, [1970] 21 U.S.T. 77, 100-01. The absence of any evidence establishing that petitioner was prejudiced by the State's failure to comply with the Vienna Convention makes this case unsuitable for the Court to address the questions petitioner presents—whether a criminal defendant has an individually enforceable right under the Vienna Convention and whether suppression of evidence is the appropriate remedy for violation of that right.

Petitioner also asks this Court to consider whether the State violated his rights under the Fifth and Fourteenth Amendments when it obtained custodial statements. The law in this area is well established and this case presents nothing new for this Court's consideration. Although petitioner may be correct that the State's violation of the Vienna Convention would be a new factor for the Court to consider in determining

whether his statements were voluntarily made, that claim is not properly before this Court. Petitioner failed to preserve that claim in the state trial court and the Oregon Court of Appeals and, although he presented the claim to the Oregon Supreme Court, that court refused to address it. Therefore, it is not properly before this Court. *See Cutter v. Wilkinson*, 544 U.S. ___, 161 L. Ed. 2d 1020, 1032 n. 7, 125 S. Ct. 2113, 2120 n. 7 (2005) ("Because these defensive pleas were not addressed by the [lower court], and mindful that we are a court of review, not of first view, we do not consider them here.").

2.a. Petitioner contends that the trial court erred in refusing to suppress post-arrest statements petitioner made to the police. Petitioner sought suppression because the police failed to inform him that he could contact the Mexican consulate and failed to contact the consulate and notify them of petitioner's arrest. Pet. 12-22. In order to prevail on a claim that statements should be suppressed whenever the State fails to fully follow the requirements of the Vienna Convention, a criminal defendant must prevail on three questions: (1) Does the Vienna Convention, a treaty among nations, confer individually enforceable rights? (2) If it does, is suppression of statements in a criminal case in state court an appropriate remedy for the violation of those rights? and (3) If suppression is a remedy, has the defendant made the showing of prejudice necessary to have the statements suppressed in his or her particular case? If the court answers "no" to any of these questions, the defendant loses and the statements should not be suppressed on the basis of a violation of the Vienna Convention.

This case does not warrant granting review because petitioner asks this Court to consider only the first two of those three questions, presumably because petitioner has never made a showing that things would have turned out differently had the State fully complied with the Vienna Convention. His failure to address the third question makes this case an inappropriate vehicle for this Court to review the first two questions, so the State begins there.

Petitioner made no attempt in the trial court or the state appellate courts to establish that he suffered prejudice as a result of the State's failure to comply with the Vienna Convention notification requirements. Petitioner did not establish in the state trial court—and therefore could not establish in the state appellate courts—that he would have done anything differently in his interactions with the police had they informed him of his "right" to consular notification. Nor did petitioner establish how the Mexican consul would have responded to notification had the police informed the consul of petitioner's arrest. The closest petitioner comes is to attach a letter from the Consul General of the Consulate of the United Mexican States in Portland, Oregon, to state legislative leaders in 2001, explaining efforts of the Mexican government under the Vienna Convention and encouraging the passage of state legislation that would promote compliance with the Vienna Convention. Pet. App. 25-29. That letter was not made part of the record before the trial court and, even had it been, is insufficient to establish petitioner was prejudiced as a result of the State's failure to comply with the Vienna Convention because it says nothing about how petitioner would have responded to actions usually taken by the Mexican consul in response to notification.

In *Breard v. Greene*, 523 U.S. 371 (1998), this Court expressed considerable skepticism that *any* remedy could be granted under the Vienna Convention without a showing of prejudice. The Court concluded that, even if a foreign national has individually enforceable rights under the Vienna Convention, the individual must comply with procedural rules in order to bring a claim. *Id.* at 376-77. Because "Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts[,]" *Id.* at 375, the Court denied his petition for an original writ of habeas corpus and petition for certiorari. *Id.* at 378.

The Court noted that Breard's failure to raise his claim under the Vienna Convention in state court prevented Breard from obtaining an evidentiary hearing that would be necessary to establish his claim. "Without a hearing, Breard cannot establish how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him." *Id.* at 376. "Even were Breard's Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Id.* at 377.

The same problem exists in this case. Petitioner cannot now establish how compliance with the Vienna Convention would have had an effect on his trial and conviction. Nor does petitioner offer any reason why this Court should disregard his

failure to establish prejudice. On this limited record, this Court need not reach the issues petitioner presents.

b. State and federal courts that have considered this issue have reached a similar conclusion that a defendant must establish prejudice in order to prevail in a claim under the Vienna Convention. In *United States v. Tapia-Mendoza*, 41 F.Supp.2d 1250, 1254 (D. Utah 1999), the court set out a specific test of prejudice. To establish prejudice for a Vienna Convention violation, the court held, the defendant must produce evidence that: (1) he did not know of his right to consult the consulate; (2) he would have availed himself of the right, had he known of it; and (3) there was a likelihood that contact with the consulate would have resulted in assistance to him. *See United States v. Rodrigues*, 68 F.Supp.2d 178, 183 (E.D.N.Y. 1999) (holding that "courts have unanimously held that in order for a foreign national to win relief for a Convention violation, he or she must show that the lack of consular notification prejudiced his or her case," and that, in any event, suppression is not a remedy); *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000) ("Even presuming the Vienna Convention creates individually enforceable rights, Mr. Chanthadara has not demonstrated that denial of such rights caused him prejudice"), *cert. den.* ___ U.S. ___ [122 S. Ct. 457] (2001); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir.), *cert. den.* 521 U.S. 1144 (1997) ("Murphy has also failed to establish prejudice from the alleged violation of the Vienna Convention because he is unable to explain how contacting the Mexican consulate would have changed either his guilty plea or his sentence"). Moreover, "[p]rejudice has never been—nor could

reasonably be—found in a case where a foreign national was given, understood, and waived his or her *Miranda* rights." *Rodrigues*, 68 F.Supp.2d at 184.[2]

c. On the two questions petitioner did preserve and litigate—whether the Vienna Convention creates individually enforceable rights and whether suppression of evidence in a criminal trial is an appropriate remedy for violation of the Vienna Convention—petitioner has not demonstrated that this case warrants this Court's review. Petitioner does not—and cannot—argue that there is a split among the lower courts on these issues. To the contrary, the lower courts have been remarkably consistent in rejecting the arguments petitioner makes.

In addition to the Oregon Supreme Court, every other court in this country that has addressed the first question has concluded that the Vienna Convention does not establish a right that is individually enforceable in a criminal proceeding. *See United States v. De La Pava*, 268 F.3d 157, 164-65 (2nd Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192, 195-98 (5th Cir.), *cert. den.* 533 U.S. 962 (2001); *United States v. Emuegbunam*, 268 F.3d 377, 392, 394 (6th Cir. 2001), *cert. den.* 535 U.S. 977 (2002); *State v. Vasquez*, 2001 Del. Super. LEXIS 209 (Del. Super. Ct. 2001); *Villegas v. State*, 273 Ga. 824, 546 S.E.2d 504 (2001); *Kansas v. Rosas*, 28 Kan. App. 2d 382, 17 P.3d 379 (2000); *Commonwealth v. Diemer*, 57 Mass. App. Ct. 677, 785 N.E.2d 1237

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[2] As the *Rodrigues* court explained, "Courts have uniformly found that no prejudice can exist in that situation, because the advice a consular official would give would simply augment the content of *Miranda*, which the foreign national has already waived." 68 F.Supp.2d at 184.

(2003); *New Jersey v. Homdziuk*, 369 N.J. Super. 279, 848 A.2d 853 (2004); *State v. Martinez-Rodriguez*, 131 N.M. 47, 54, 33 P.3d 267 (New Mexico 2001), *cert. den.* 535 U.S. 937, 152 L. Ed. 2d 225, 122 S. Ct. 1317 (2002); *Kasi v. Commonwealth*, 256 Va. 407, 508 S.E.2d 57 (Virginia 1998), *cert. den.* 527 U.S. 1038 (1999); *Wisconsin v. Navarro*, 659 N.W.2d 487 (2003); *see also United States v. Li*, 206 F.3d 56, 61 (1st Cir. 2000) (*en banc*), *cert. den. sub nom Mu v. United States*, 531 U.S. 956 (2000) (Selya and Boudin, JJ, concurring, concluded that no individual right is created by the Vienna Convention).[3]

d. Similarly, every appellate court that has addressed the second question has concluded that suppression of otherwise legally obtained evidence is not an appropriate remedy for violations of Article 36 of the Vienna Convention. One of the more-thoroughly analyzed opinions, relied on by many other courts, is the Ninth Circuit's *en banc* discussion of the issue in *Lombera-Camorlinga*. Because of the persuasiveness of the court's analysis, the State summarizes it briefly for this Court. Like petitioner in this case, Lombera-Camorlinga argued that the Vienna Convention was intended to serve the same purposes as the warnings required by *Miranda*, and

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[3] One court has recognized foreign nationals' standing to bring actions for damages for violations of the Vienna Convention. *Standt v. City of New York*, 153 F. Supp. 2d 417 (S.D.N.Y. 2001) (violation of Article 36 supports action under 42 USC § 1983). In addition, the International Court of Justice reads Article 36 to provide rights to individuals, however the decisions of that court are not binding on courts in this country. *See LaGrande* case (*Germany v. United States of America*), 2001 I.C.J. 466 (Judgment of June 27) and *Case Concerning Avena and other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. No. 128 (Judgment of Mar. 31).

that, like a violation of *Miranda*, failure to comply with the Convention notice requirements demands suppression. A panel of the Ninth Circuit agreed with the defendant. *United States v. Lombera-Camorlinga*, 170 F.3d 1241 (9th Cir. 1999). The full court withdrew the panel opinion and, in its *en banc* decision, rejected the defendant's argument, relying on the following points:

* Unlike *Miranda*, the advice of rights required by Article 36 is not tied to interrogation.

* The Vienna Convention does not require interrogation to cease once the suspect invokes the right to have the consulate notified.

* The rights to counsel and against self-incrimination are not "universally recognized or enforced" internationally.

* Because the Vienna Convention was drafted before the United States Supreme Court decided *Miranda*, there is "no reason to think the drafters of the Vienna Convention had these uniquely American rights [*i.e.*, suppression of evidence for a violation] in mind[.]"

* "[A]n exclusionary rule is typically available only for constitutional violations, not for statutory or treaty violations."

* Although entitled to only "some deference," the United States Department of State "has expressed its opinion that suppression is an inappropriate remedy."[4]

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[4] The court noted:

> The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary. The addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches.

206 F.3d at 887.

> * "[N]o other signatories to the [Vienna Convention] have permitted suppression under similar circumstances, and * * * two (Italy and Australia) have specifically rejected it."

206 F.3d at 886-88.

As noted, no appellate court has reached a result that is contrary to the analysis set out in *Lombera-Camorlinga* and many courts have reached the same conclusions as the Ninth Circuit, often relying on the Ninth Circuit's reasoning. For examples of state courts holding that suppression is not a remedy in a criminal proceeding when law enforcement officers do not comply with Article 36 of the Vienna Convention, *see Arizona v. Prasertphong*, 75 P.3d 675, 407 Ariz. Adv. Rep. 31 (2003); *People v. Corona*, 89 Cal. App. 4th 1426, 1429, 108 Cal. Rptr. 2d 210 (2001); *People v. Preciado-Flores*, 66 P.3d 155 (Colorado 2002); *People v. Hernandez*, 745 N.E. 2d 673, 683 (Ill. App. 2001); *Zavala v. Indiana*, 739 N.E.2d 135 (Ind. 2000); *State v. Buenaventura*, 660 N.W.2d 38, 46 (Iowa 2003); *State v. Rosas*, 17 P.3d 379, 386 (Kan. App. 2000); *Commonwealth v. Diemer*, 57 Mass. App. Ct. 677, 785 N.E.2d 1237 (2003), *review denied* 439 Mass. 1106, 790 N.E.2d 1089 (2003); *Cardona-Rivera v. State*, 33 S.W.3d 625, 627 (Mo. App. 2000); *New Jersey v. Homdziuk*, 369 N.J. Super. 279, 848 A.2d 853 (2004); *State v. Martinez-Rodriguez*, 33 P 3d 267 (N.M. 2001); *Garcia v. State*, 17 P.3d 994, 117 Nev. Adv. Rep. 13 (2001); *State v. Tuck*, 2001 Ohio 7017, 146 Ohio App. 3d 505, 766 N.E.2d 1065 (2001); *Rocha v.*

State, 16 S.W. 3d 1 (Tex. Ct. Crim. App. 2000);[5] *State v. Jamison*, 20 P.3d 1010, 1016 (Wash. App. 2001) (following *Lombera-Camorlinga*); *State v. Martinez-Lazo*, 999 P.2d 1275 (Wash. App. 2000) (same).[6]

In addition to the Ninth Circuit in *Lombera-Camorlinga*, other federal courts have concluded that suppression is not a remedy for violation of the Vienna Convention. *See, e.g., United States v. Li*, 206 F.3d at 60; *United States v. Jimenez-Nava*, 243 F.3d at 198;[7] *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000), *cert.*

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[5] After pointing out that no other signatories to the Vienna Convention have permitted suppression in similar circumstances, the court observed:

> If we find now that the Vienna Convention treaty must be enforced through the exclusionary rule provided by [the state statute], Texas may soon find itself to be the *only* jurisdiction in the entire world that enforces the treaty through the use of an exclusionary rule sanction.

16 S.W. 3d at 17 (emphasis in original; footnote omitted).

[6] The State is aware of only one decision by any state or federal court in the nation holding that suppression is an appropriate remedy in such circumstances. In *State v. Reyes*, 740 A.2d 7 (Del. Super. 1999), the intermediate appellate court—applying federal law—concluded that suppression is appropriate for a Vienna Convention violation. It should be noted, however, that the *Reyes* court relied heavily on the analysis in the panel opinion in *United States v. Lombera-Camorlinga*, 179 F.3d 1241 (9th Cir. 1999). But, as noted above, that decision was withdrawn by the *en banc* Ninth Circuit, which concluded that suppression is not a remedy. Moreover, the *Reyes* decision has been called into question by a subsequent case. In *State v. Vasquez*, 2001 Del. Super. LEXIS 209 (Del. Super. Ct. May 23, 2001), the court noted that *Reyes* was based on a decision that had since been overruled and commented that "[i]t is very likely that this Court would decide the matter differently now based on the current state of the law regarding consular notification."

The Fifth Circuit also cited Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT'L L. 147, 179 (1999) ("It would take an enormous leap in logic, therefore, to argue that the signatories to the Vienna

Footnote continued...

den. 532 U.S. 1056 (2001); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 622 (7th Cir.), *cert. den.* 531 U.S. 1026 (2000)[8]; *United States v. Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. den. sub nom Zuniga v. United States*, 531 U.S. 1131 (2001).

e. The rulings of these appellate courts are consistent with the position taken by the State Department on these issues. The State Department is responsible for the negotiation and administration of treaties and its interpretation of treaties is entitled to considerable weight, although not binding on reviewing courts. *Kolovrat v. Oregon*, 366 U.S. 187, 194, 6 L. Ed. 2d 218, 81 S. Ct. 922 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great

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(...continued)
Convention intended for violations to be cured by the exclusion of evidence or the dismissal of charges.").

[8] The Seventh Circuit noted:

> We also note that to impose judicially such a drastic remedy, not imposed by any other signatory to this convention, would promote disharmony in the interpretation of an international agreement. *See* Restatement of Foreign Relations Law § 325 cmt. d (1987) ("Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between international legal systems.").

226 F.3d at 622.

weight."). The State Department consistently has taken the position that the Vienna Convention may benefit foreign nationals, but it does not create judicially enforceable individual rights that can be remedied in the criminal justice systems of the signatory countries. *See Li*, 206 F.3d at 63-64; *see generally* Brief for the United States as Amicus Curiae Supporting Respondent filed in *Medellin v. Dretke*, No. 04-5928, at 18-31.

According to the State Department, "the [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Li*, 206 F.3d at 63 (quoted authority and quotation marks omitted). In *Li*, the First Circuit Court of Appeals specifically asked the State Department its views on whether the Vienna Convention creates individual rights at all. *Id.* The State Department concluded that the Vienna Convention is a treaty that establishes rights between the signatory countries, not rights of individuals. "The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned." *Id.*, quoting the Department of State Answers to the Questions Posed by the First Circuit. The State Department asserted this same position in two international tribunals, including the International Court of Justice, and in an advisory letter to state governors in 1970 and another advisory letter issued in 1989. *Id.*, at 64.

The Executive Branch continues to take the position that the Vienna Convention does not confer individually enforceable rights, including before this

Court last term. The United States appeared as amicus curiae in *Medellin v. Dretke*, 544 U.S. ___, 125 S. Ct. 2088, 161 L. Ed. 2d 982 (2005), and argued that Article 36 of the Vienna Convention "does not give a foreign national a judicially enforceable right to challenge his conviction or sentence." Brief of United States at 22-23. Although the President of the United States has determined that the International Court of Justice *Avena* decision should be enforced in state courts for the 51 involved individuals, that determination does not apply to petitioner's case or provide a basis for this Court's review of petitioner's claims.

f. Part of petitioner's argument deserves special comment. Petitioner argues that traditional remedies for violations of international treaties are insufficient for violations of Article 36 of the Vienna Convention and that he "is also entitled to suppression because of the egregious nature of the police misconduct." Pet. 21. Petitioner is wrong on both points. Interpretation, application, and enforcement of an international treaty is an area that traditionally has been an executive branch function. And there are good reasons for that. As a concurring opinion in the First Circuit's *en banc* decision in *Li* pointed out in the context of the Vienna Convention:

> There is an elaborate regime of practices and institutions by which the United States and other nations enforce commitments *inter sese* or decide that, in the national interest, promises given by or to another sovereign should not be enforced in a specific case. Sometimes this is done purely for reasons of prudence, sometimes for convenience, or sometimes to secure advantage in unrelated matters. Incalculable mischief can be wrought by gratuitously introducing into this often delicate process court enforcement at the instigation of private parties. We believe that such a course is to be avoided unless it can be said that private enforcement was clearly agreed to and envisioned by the

> contracting States in the treaties themselves. That is plainly not the case here.

Li, 206 F.3d at 68 (Selya and Boudin, JJ, concurring).[9] Contrary to petitioner's assertion that suppression is required "to secure law enforcement's compliance with the treaty's terms" (Pet. 21), use of a suppression remedy in state court in this context could have serious diplomatic and political consequences by interfering with the traditional remedies.

Moreover, no special remedy is needed "because of the egregious nature of the police misconduct." Pet. 21. Although it is true that there have been violations of the Vienna Convention in spite of the 35-plus years of its existence, it is not true that this Court must impose suppression as a remedy for violations of the Convention because "[t]he state's disregard for the treaty plainly illustrates why suppression is the most likely remedy to secure law enforcement's compliance with the treaty's terms" and that "[u]nless and until consular notification and access is enforced by means of suppression, violations will continue to occur on a regular basis." *Id.*

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[9] Similarly, the court in *Lombera-Camorlinga* explained:

> The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary. The addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches.

206 F.3d at 887.

Contrary to petitioner's dire warnings that only this Court's ruling requiring suppression of evidence can improve compliance with the Vienna Convention, the State has taken significant steps on its own to ensure greater compliance. The State has worked with numerous interested parties to enhance awareness of the Vienna Convention requirements and simplify compliance. Oregon Attorney General Hardy Myers convened a group in September 2000 to explore ways in which Oregon law enforcement officials could more efficiently comply with Article 36 of the Vienna Convention. *See* Peter Shepherd, *The Vienna Convention on Consular Relations: An Oregon Law Enforcement Perspective*, 11 Willamette J. Int'l L. & Dispute Res. 53, 58 (2004). As a result, police recruits and newly hired law enforcement officers receive special instruction about the Vienna Convention and jail managers have agreed on a form of notification to be used in all state jails to notify aliens of the requirements of the Convention. *Id.* at 58-9.

In addition to these steps, the 2003 Oregon Legislative Assembly enacted two laws related to Article 36 of the Vienna Convention. One amended Or. Rev. Stat. §§ 181.642, 426.070, 426.228 and 426.234 to clarify the obligation of the Board on Public Safety Standards and Training to include training about the Vienna Convention requirements for all police officers and certified reserve officers, to direct a peace officer who takes a person into custody and suspects that the person is a foreign national to comply with the Convention notification requirements, and to direct judges and health professionals involved in mental commitment procedures to inform any allegedly mentally ill person who is suspected of being a foreign national of the

Vienna Convention provisions. Or. Laws 2003, ch. 109. The second piece of legislation amended Or. Rev. Stat. §§ 109.119, 125.060, 419A.255 and 419B.851 to require service of certain legal documents on the consulate where appropriate under the Vienna Convention. Or. Laws 2003, ch. 143. The changes in both of these enactments took effect on January 1, 2004.

These efforts demonstrate that the State has not deliberately disregarded or neglected its duties under the Vienna Convention. It is not necessary for this Court to impose the extreme remedy of suppression in order to prompt the State to do what it is required to do by law.

3. As a second issue, petitioner asks this Court to review whether his statements to the police should have been suppressed because they were not voluntary. The Oregon Supreme Court did not address this "alternate theory for suppression, *viz.*, that the circumstances surrounding his arrest and detention show that his post-arrest statements, including his purported waiver of his *Miranda* rights, were not made voluntarily." *Sanchez-Llamas*, 338 Or. at 269 n. 2, Pet. App. 15.

Petitioner acknowledges that "this [C]ourt has examined the voluntariness of *Miranda* waivers under coercive circumstances in the past." Pet. 22. Nevertheless, petitioner asserts that "this case presents that question in the unique light of the police failure to inform petitioner of his Vienna Convention rights to consular notification and access." *Id.* Contrary to petitioner's assertion that this "presents a question of first impression," *id.*, the claim involves the application of settled law to the specific

facts in this case and presents nothing new for this Court's review.[10] Although petitioner challenged the voluntariness of his statements on several grounds in the state trial court and Court of Appeals, violation of the Vienna Convention never was one of those grounds. The first time he raised that particular issue was before the Oregon Supreme Court. However, his failure to present it before then meant that it was not properly before the state supreme court on review. Or. Rules App. Proc. § 9.20(2), App 1. And his failure to properly present it in the state courts means it is not properly before this Court on review. *United States v. Williams*, 504 U.S. 36, 41-42 (1992).

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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August 15, 2005

MHW:mlk:APP82973

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[10] This Court "rarely" grants a petition for certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10.

APPENDIX

Or. Rules App. Proc. § 9.20(2)

If the Supreme Court allows a petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals.

No. 04-10566

IN THE

SUPREME COURT OF THE UNITED STATES

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

PROOF OF MAILING: RESPONDENT'S BRIEF IN OPPOSITION

I, Erika L. Hadlock, a member of the Bar of the Court, hereby certify that on August 15, 2005, in compliance with Rule 29, I mailed the Respondent's Brief in Opposition of the State of Oregon in the above-entitled case, by depositing 10 copies in the United States mailbox, express mail, postage prepaid, addressed to the Office of the Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.

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PROOF OF SERVICE: RESPONDENT'S BRIEF IN OPPOSITION

I, Erika L. Hadlock, a member of the Bar of the Court, hereby certify that on August 15, 2005, three copies of the Respondent's Brief in Opposition of the State of Oregon in the above-entitled case were mailed, first class postage prepaid, to Peter A. Ozanne and Susan F. Drake, Office of Public Defense Services, 1320 Capitol Street NE, Suite 200, Salem, Oregon 97303-6469, attorneys for petitioner. I further certify that all parties required to be served have been served.

Erika L Hadlock

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